

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia.

APRIL TERM, 1922.

No. 3772.

862

MAX COHEN, APPELLANT.

vs.

ALBERT B. FALL, SECRETARY OF THE INTERIOR, AND
WILLIAM SPRY, COMMISSIONER OF THE GENERAL
LAND OFFICE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED JANUARY 19, 1922.

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Court of Appeals of the District of Columbia.

APRIL TERM, 1922.

No. 3772.

MAX COHEN, APPELLANT,

vs.

ALBERT B. FALL, SECRETARY OF THE INTERIOR, AND
WILLIAM SPRY, COMMISSIONER OF THE GENERAL
LAND OFFICE, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia.

No. 3772.

MAX COHEN, Appellant,

vs.

ALBERT B. FALL, Secretary, &c., et al.

a Supreme Court of the District of Columbia.

In Equity.

No. 39134.

MAX COHEN, Plaintiff,

v.

ALBERT B. FALL, Secretary of the Interior, and WILLIAM SPRY, Commissioner of the General Land Office, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, towit:

Bill of Complaint.

Filed June 25, 1921.

In the Supreme Court of the District of Columbia.

In Equity.

No. 39134.

MAX COHEN, Plaintiff,

v.

ALBERT B. FALL, Secretary of the Interior, and WILLIAM SPRY, Commissioner of the General Land Office.

To the Honorable the Justices of said Court holding a special Term as a Court of Equity:

The plaintiff states as follows:

1. That the plaintiff, Max Cohen, is a citizen of the United States, and a resident of the State of Arizona, and brings this suit in his own right.

2. That the defendants, Albert B. Fall, Secretary of the Interior, and William Spry, Commissioner of the General Land Office, are both citizens of the United States, and temporarily residents of the District of Columbia, and are sued therein for acts done and threatened by them in their official capacities, respectively.

3. That on January 16, 1912, John Rooney made homestead entry 016439 Phoenix, Arizona, for the S. W. $\frac{1}{4}$ Section 20, T. 3 N., R. 4 E., Gila and Salt River Meridian, claiming to have served three years in the United States Army during the Civil War, and it is also claimed he established residence and made improvements thereon.

4. That on December 6, 1912, on the date, just prior to his death, he executed and delivered to Thomas Boyle a relinquishment of said homestead entry, and at the same time, it is claimed, executed and delivered to said Boyle, a will devising all his real and personal property to him.

5. That Rooney's relinquishment was assigned, turned over to and delivered by said Boyle to his daughter, Helen, who on December 2, 1913, filed the same accompanied by her homestead application 023862, for the same land, which was rejected. Appeal was prosecuted by her to the Interior Department where the rejection was finally affirmed; that subsequently, the suspension on account of which it was rejected having been revoked, by decision of August 5, 1918, the Department remanded the case with directions to allow her application in the absence of any intervening claims. Her application was finally rejected May 12, 1917, and closed out.

6. That on the 18th day of August, 1916, the said land being public land of the United States, subject to entry under the homestead law, and being qualified to make entry under said law, plaintiff

Cohen filed application in all things in accordance with the law and regulations, to enter said land, his application being given serial number 030912, to make entry thereof.

7. That on August 31, 1916, after the due and legal acceptance of the said application, and while it was pending unacted upon by the local officers, the said Thomas Boyle filed application to enter said tract, being given serial number 030981, as additional to his homestead entry No. 1399, made May 10, 1920, for the N. $\frac{1}{2}$ N. E. 4 Section 31, T. 3 N. R. 3 E. G. & S. R. M.

8. That Boyle's said application to make entry was rejected
3 by the Commissioner of the General Land Office, by letter "C," March 12, 1917, *because of the prior application of Cohen*, and that the land had not been designated, and that the land of his original homestead, being in a second-form withdrawal, could not be designated.

9. That subsequently, to wit, March 11, 1918, the Commissioner, of his own motion, held the withdrawal of the land did not preclude designation of the land, allowing Cohen 30 days within which to show cause why his application should not be rejected, and *the entry of Rooney re-instated* for the benefit of his heirs or devisees, the relinquishment by him having been filed after the entryman's death.

10. That Cohen in due time prosecuted his appeal from this decision and these requirements resulting in the rejection of his application and denial by the Department of his motion for rehearing by decision dated October 24, 1918, and his application finally rejected June 26, 1919, and on March 12, 1921, final action taken by the Department, Rooney's entry being reinstated and left intact as devisee and heir of John Rooney as held by the Commissioner.

11. That Boyle, claiming as such heir and devisee, made final proof on the 26th day of June, 1919, basing his claim upon what purported to be Rooney's will, which the local officers, and the Commissioner later, held had never been probated, although executed December, 1912, in violation of the statutes of Arizona in such cases made and provided.

12. That Cohen, on the date the final proof was submitted, filed protest against its acceptance.

13. That notwithstanding the local officers held in their
4 decision dated June 26, 1919, that the claim upon which the final proof submitted by Boyle was based upon the claim under the will of John Rooney, that it had never been probated, which decision the Commissioner subsequently affirmed also holding and deciding the will had not been probated and directed the local officers to require Boyle to have it probated and the proof of such probate filed promptly, the protest of Cohen was utterly and entirely ignored and final certificate issued.

14. That under and in strict accordance with Section 2 of the Act of May 14, 1880 (21 St. 140), which provides that in all cases where any person has contested, paid the Land Office fees, and procured the cancellation of any homestead entry, he shall be notified by the Register of the Land Office of the District in which such

land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter the land, Cohen filed contest affidavit and applied to contest said entry of Boyle, but the Register and Receiver unlawfully, wrongfully, arbitrarily and capriciously rejected and refused to consider said application to contest because, as assumed by them, it was not corroborated in accordance with the current circular of instructions which contains requirements admittedly made for the purpose of hindering and preventing the due, regular and lawful execution of the statute according to its specific terms and the evident purpose of Congress in its enactment, and dismissed his said application to contest.

15. That within the time allowed therefore by the Rules of Practice, the plaintiff, Cohen, appealed to the Commissioner of the General Land Office who affirmed said decision; whereupon
5 he duly and regularly appealed to the Department, which also affirmed it, conceding the purpose of the arbitrary requirement not embraced in the Statute and contrary to the purpose and intention of Congress in its enactment were so made and required for the purpose of defeating the operation of the statute, and denied to Cohen the right admittedly given him by the plain unambiguous specific language of the statute.

16. That the motion by Cohen for rehearing of said decision, which was duly and regularly filed, was denied, and a petition for the exercise of the supervisory power of the Department was also denied; whereupon in answer to letter of his counsel as to the use of Cohen's affidavit as an illustration of false charges made against entrymen, in effect, accusing him of perjury in making such affidavit, the arbitrary purpose to protect entrymen against its execution was admitted and attempted to be justified and defended.

17. The plaintiff avers that he is advised by counsel, and, therefore, alleges that the cancellation of the entry of Rooney under his relinquishment by Boyle's daughter, Helen, *eo instanti*, destroyed and rendered for naught the entry of Rooney and the land immediately became public land of the United States as free from all claims under said entry as if it had never been made, and was open to entry by any qualified person.

18. That neither the Commissioner nor the Secretary of the Interior had any power to reinstate this statutory abandonment of whatever right existed under the entry thus cancelled in strict accordance with the law, and their attempt to do so was illegal, wrongful and arbitrary and conferred no right whatever
6 upon Boyle or the heirs of Rooney, and all proceedings subsequent to this reinstatement are illegal, wrongful and absolutely void for lack of power in said officials to thus defeat the provisions of the statute; and plaintiff further avers that his protest against the acceptance of the final proof submitted by Boyle, upon this void proceeding, should have been sustained and the proof rejected.

19. The plaintiff also avers that because of his prior application to make entry of said land, as aforesaid, when it was free from the

entry of Rooney, canceled upon relinquishment, which application was accepted and allowed the subsequent application to make entry by Boyle in his own name and behalf as an addition to his then existing entry should have been canceled and his prior and superior right, superior to that of Boyle or the heirs or devisees of Rooney, which was rejected because of his, Cohen's, prior application gave plaintiff a statutory right which was illegally and wrongfully canceled by the Department through the Commissioner of the General Land Office and the entry of Rooney, so canceled on his relinquishment, wrongfully and illegally reinstated for the benefit of the heirs and devisees of Rooney, and final certificate was issued upon said protested proof, notwithstanding its invalidity and his prior and superior right duly asserted as aforesaid.

20. And plaintiff further avers by the filing of the relinquishment of Rooney by Boyle, through his daughter Helen, and permitting her to make application to enter the land in her own name, he waived and lost all right or interest, if any, which he might have

7 had in it, whether it was filed before or after the death of Rooney, as it was an assignment or conveyance coupled with an interest and after its use and cancellation of the entry through his undisputed connivance, he is forever estopped from obtaining any benefit therefrom or thereunder.

21. And plaintiff further avers that when he conceded and withheld from probate the pretended will which was at all times after its execution, in his exclusive possession and control, from December 6, 1912, the date of the death of Rooney, until after the local officers refused to approve his final proof, namely, June 26, 1919, and in point of fact it is shown by letter of the Register and Receiver, dated May 26, 1920, transmitted copy of the distribution of the estate of Rooney, stating therein that it was filed in their office May 25, 1920, "which completed the proof," made June 26, 1920, notwithstanding the Commissioner had previously directed that proof of probate should be promptly filed, a period of nearly seven years, in open and notorious violation of the statutes of Arizona in such case made and provided the probate is required to be made within thirty days after the death of the testator, he, the said Boyle, was guilty of an offense amounting to fraud, which should prevent his obtaining any benefit therefrom.

22. That when said Boyle, with full knowledge of said will, under which he subsequently made final proof as devisee, and while thus secretly withholding it from probate, and while also holding a pretended bill of sale of the land, applied to make entry in his own name and right as an addition to his entry, he again waived any

8 and all rights, if any he had, to obtain any benefit from either instrument, especially when they constitute fraud upon Cohen who sought to obtain title in a lawful manner, as they do under his said acts. All of these acts must be viewed in the light of his subsequent action, and when so viewed, were, and are, clearly fraudulent and vitiate any advantage he had obtained on account of them, all to the detriment and loss of the plaintiff, who

was, and is entitled to complete title to the land by compliance with the law in further requirements under his said prior and superior application.

23. And plaintiff avers that the refusal by the Department on Cohen's appeal, in its decision bearing date February 9, 1921, to consider this illegal and void attempted reinstatement of the Rooney entry became *res adjudicata*, and that therefore no further consideration would be given that feature of the case, notwithstanding the doctrine enunciated by the United States Supreme Court in the case of Knight v. United Land Association, 142 U. S. 161, to the effect that when a case is before the Department it is its duty to see that the public lands do not go to persons not entitled to them illegal and wrongful.

24. The plaintiff avers that by reason of said illegal actions of the defendants, the Secretary of the Interior and the Commissioner of the General Land Office in rejecting his legal application to enter said land when he was fully qualified and the land was subject thereto, and the reinstating of said canceled entry, and permitting final proof to be made thereon, giving credit for the services of Rooney in the Civil War, over his protest duly filed; and the further illegal and wrongful denial of his statutory right to contest said

9 entry, and the threatened action of the defendants to issue patent to Boyle thereunder for the benefit of the devisees and heirs of Rooney, for said land, he, the plaintiff, is being irreparably damaged, that the record title to his said described land has been mutilated, and by reason thereof he has been and is now and until relief shall have been accorded him by the Honorable Court, will continue to be disturbed in his quiet possession and enjoyment of his said land, and by reason of the great faith and credit reposed by the general public in the acts and doings of officials of such high degree the title to his said land has by their aforesaid acts become clouded and the market value thereof greatly lessened, and unless restrained therefrom by this Honorable Court the defendants will assume the right of authority to issue a patent for said land based upon said final certificate.

The Premises Considered, The Plaintiff Prays as follows:

First. That the United States writ of subpoena issue out of this Honorable Court, directed to the defendants, Albert B. Fall, Secretary of the Interior, and William Spry, Commissioner of the General Land Office, commanding them and each of them to be and appear in this court on a day certain therein named to answer the exigencies of this Bill and to abide the judgment of the court.

Second. That pending the final hearing of this cause, the said defendants and each of them may be restrained and enjoined from issuing a patent for said land to the said devisee and heirs of Rooney, or to any other person, except the plaintiff, as by law provided.

10 Third. That upon the final hearing of this cause the defendants may be perpetually enjoined and restrained from issuing a patent for said land to the said devisee and heirs of Rooney, or to any other persons than the plaintiff; that the defendants may be commanded and enjoined to cancel upon the records

of the General Land Office the said homestead entry and any and all other subsequent proceedings thereunder and in virtue thereof; and that they may be commanded and enjoined to reinstate upon the records of the General Land Office the application of the plaintiff to make homestead entry of said land and issue to him all notices and papers which may be necessary to the completion of his legal title to said lands, and to allow such entry and issue patent to him in due course under said law, and to take such other and further proceedings as to permit him to obtain the right to a patent by any further additional compliance with the homestead law.

Fourth. And that the plaintiff may have such other and further relief in the premises as the nature of the case may require and to this Honorable Court may seem meet and proper.

MAX COHEN, *Plaintiff*,
S. M. STOCKSLAGER,
His Attorney.

505 McGill Bldg., Washington, D. C.

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Affidavit.

DISTRICT OF COLUMBIA, ss:

I do solemnly swear that I am one of the attorneys for the person named as plaintiff in the foregoing bill of complaint; that I have read said bill and know the contents thereof, and that the facts therein stated as of personal knowledge are true and those stated as upon information and belief I believe to be true.

S. M. STOCKSLAGER.

Subscribed and sworn to before me, this 25th day of June, A. D. 1921.

[SEAL.]

JAMES L. CRAWFORD,
Notary Public.

Service of the above and foregoing complaint acknowledged this 24 day of June, 1921.

CHARLES D. MAHAFFIE,
Attorney for Defendants.

Motion to Dismiss.

Filed July 14, 1921.

* * * * *

Come now the defendants by their attorney and move to dismiss the bill of complaint filed in the above entitled suit; and for cause show:

(1) That, as appears on the face of the bill, this suit seeks and involves the direct review of the act of the defendants in administering the public land laws of the United States, and the rules and regulations made thereunder, in their applica-

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tion to a controversy between the plaintiff and another interested party, which action involved the exercise of judgment and discretion; but that the court is without jurisdiction to review and control the defendants in matters involving the exercise of such judgment and discretion.

(2) That the situs of the land in controversy is without the jurisdiction of this court; that the judgment rendered by the defendants as to the right to acquire title to said land under the public land laws was in favor of one Thomas Boyle, to whom, as the bill shows, final certificate vesting the equitable title in said land has already issued, and to whom a patent conveying the legal title is about to issue; that the granting of the relief sought will operate to deprive said Boyle of his equitable right in the land; that said Boyle is consequently an indispensable party to this suit in whose absence the suit ought not to proceed.

(3) That if in the adjudication of the respective claims of plaintiff and said Boyle to this land the defendants have committed error of law, as alleged in the bill of complaint, and so patent the land to said Boyle, plaintiff has the usual, complete, and wholly adequate remedy of a suit against said Boyle to charge said patent with a trust in his favor.

ALBERT B. FALL,
Secretary of the Interior;
 WILLIAM SPRY,
Commissioner of the General Land Office,
 By Their Attorney: C. EDWARD WRIGHT.

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Amendment to Bill of Complaint.

Filed November 10, 1921.

* * * * *

Comes now the above named plaintiff, leave of the Court having been first obtained, and amends his Bill of Complaint by adding thereto immediately after the word "thereof" in line 7, paragraph 6, page 2, of said Bill of Complaint, the words: "And on the 26th day of August, 1916, within the time allowed therefor by the law, made settlement and established residence on said land."

MAX COHEN,
Plaintiff.
 S. M. STOCKSLAGER,
His Attorney.

505 McGill Bldg., Washington, D. C.

Leave to file granted 10 Nov. 1921.

JENNINGS BAILEY,
Justice.

Decree Dismissing Bill.

Filed November 10, 1921.

* * * * *

This cause came on to be heard on defendants' motion to dismiss the plaintiff's bill as by leave of court heretofore granted, amended, and was argued by counsel; and the court being fully advised in the premises, it is, this 10th day of November, 1921,

Ordered, Adjudged and Decreed That the bill of complaint
14 be and the same is, hereby dismissed with costs to the defendants to be taxed by the Clerk.

By the Court:

JENNINGS BAILEY,
Justice.

And from the foregoing decree the plaintiff, on the day above written, in open court noted an appeal to the Court of Appeals of the District of Columbia, and the same is hereby allowed, the bond of costs on appeal being fixed at \$100, with leave, in lieu thereof, to deposit the sum of \$50 with the Clerk of this court.

By the Court:

JENNINGS BAILEY,
Justice.

No objection as to form, Nov. 9", 1921.
S. M. STOCKSLAGER.

Memorandum.

December 1, 1921.—Appeal bond of plaintiff for \$100. approved and filed.

Assignments of Error.

Filed December 1, 1921.

* * * * *

The appellant, Max Cohen, hereby designates the following assignments of error in a certain final decree of the court, entered in the above entitled cause November 10, 1921, dismissing the
15 amended Bill of Complaint filed therein by plaintiff.

1. The court erred in rendering judgment for the defendants.

2. The court erred in not rendering judgment for the plaintiff.

3. The court erred in sustaining the motion of the defendants to dismiss the plaintiff's amended complaint for any or all of the reasons in said motion stated, or for any other reason.

4. The court erred in cancelling plaintiff's entry of the land involved made when it was public land subject to settlement and entry.

5. The court erred in refusing to consider, and in denying plaintiff's protest of Boyle's final proof.

6. The court erred in denying and rejecting plaintiff's application to contest Boyle's entry, made for himself as devisee of Rooney and of Rooney's heirs.

7. The court erred in reinstating Rooney's entry which had been cancelled on relinquishment delivered by him to Boyle and by the latter to his daughter Helen, who filed it, had the entry cancelled and made application for entry in her own name.

8. The court erred in not holding and deciding that the cancellation of Rooney's entry on his relinquishment abandoned, extinguished all right of any and all persons thereunder and that no power existed in the Department to reinstate it and that all such action and that subsequently taken is ultra vires and absolutely void.

9. The court erred in not holding and deciding, that by the
16 concealment of Rooney's will delivered by him to Boyle in which he was made Executor, for a period of about seven years, in violation of the Statutes of Arizona, which require it to be probated in such cases in thirty days; his delivery of the relinquishment to his daughter who filed it and made application to enter, followed by his effort to obtain title in his application to enter it in his own name as an additional, cancelled because of the prior application of plaintiff; forfeited any right he had, if any, under the said will of Rooney.

10. The court erred in not holding and deciding the Departmental decisions sustaining the action of the Department in rejecting plaintiff's application to enter the land, rejecting his application to contest the entry made by Boyle, and reinstating it against plaintiff's statutory rights, were illegal, wrongful, beyond the power of the Department and void.

11. The court erred in failing to grant plaintiff's application for mandamus and injunction as prayed for, and in dismissing his amended bill of complaint.

12. Other errors appearing upon the face of the record.

S. M. STOCKSLAGER,
Attorney for Appellant.

Service of the above assignments of error acknowledged this 1 day of December, 1921.

C. EDWARD WRIGHT,
Attorney for Defendants.

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Designation of Record.

Filed December 1, 1921.

* * * * *

Honorable Morgan H. Beach,
Clerk Supreme Court, D. C.

SIR:

On behalf of the above named plaintiff and appellant, I request that you will cause to be prepared the Transcript of Record on appeal in the above entitled cause, and I hereby designate the following to be included in said Transcript:

1. Original Bill of Complaint.
2. Amendment to Bill of Complaint filed November 10, 1921, by leave of court first obtained.
3. Motion of Defendants to dismiss the amended Bill of Complaint.
4. Decree dismissing the complaint as amended, including endorsement thereon of appeal in open court and order fixing the amount of appeal bond for costs.
5. Assignments of Error.
6. Memorandum of Approval and Filing of Bond for Cost on Appeal.
7. This designation.

S. M. STOCKSLAGER,
Attorney for Appellant.

Service of copy of above designation acknowledged this — day of December, 1921.

C. EDW. WRIGHT,
Attorney for Defendants.

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Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 17, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 39134 in Equity, wherein Max Cohen is Plaintiff and Albert B. Fall, Secretary of the Interior, et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 13th day of December, 1921.

[Seal of the Supreme Court of the District of Columbia.]

MORGAN H. BEACH,
Clerk.

E. W.

Endorsed on cover. District of Columbia Supreme Court. No. 3772. Max Cohen, appellant, vs. Albert B. Fall, Secretary, &c., et al. Court of Appeals, District of Columbia. Filed Jan. 19, 1922. Henry W. Hodges, clerk.

(6308)

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

SEP 11 1922

Henry O. Higgins
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IN THE
Court of Appeals of the District of Columbia

APRIL TERM, 1922.

No. 3772.

MAX COHEN, APPELLANT,

vs.

ALBERT FALL, SECRETARY OF THE INTERIOR DEPARTMENT, and WILLIAM SPRY, COMMISSIONER OF THE GENERAL LAND OFFICE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

S. M. STOCKSLAGER,
Suite 505, McGill Bldg.,

Attorney for Appellant

ARNOLD MANDL,
Phoenix, Ariz.,
Of Counsel.

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IN THE
Court of Appeals of the District of Columbia

APRIL TERM, 1922.

No. 3772.

MAX COHEN, APPELLANT,

vs.

ALBERT FALL, SECRETARY OF THE INTERIOR DEPARTMENT, and WILLIAM SPRY, COMMISSIONER OF THE GENERAL LAND OFFICE.

APPEAL FROM THE SUPREME COURT OF
THE DISTRICT OF COLUMBIA.

The Case.

This is an action brought in the District of Columbia Supreme Court against the defendants in the capacity of officials of the United States for mandamus to compel them to restore to the record the claim of the plaintiff to the land involved under his settlement and residence, his contest against the entry permitted by them to be made by Thomas Boyle, as devisee under the will of one

John Rooney, the entryman, whose entry was cancelled by relinquishment executed and delivered by Rooney to Boyle, but reinstated by them, disregarding the rights of Cohen under his prior homestead settlement and residence on the land, established when it was open thereto, and totally beyond the power of the Department, and thereafter approving his final proof made thereunder and in total disregard of the plaintiff's protest against it, and for injunction to prevent the issuing of patent to said Boyle as such devisee.

Defendants moved to dismiss the bill, for the reasons that it would require a review of their decisions, which involved the exercise of discretion and judgment; that Thomas Boyle, who was without the jurisdiction of the Court, was a necessary party and that plaintiff had an adequate legal remedy. This motion was sustained by the Court and after amendment of the bill, leave of Court first having been obtained, and refile of the motion, it was sustained and judgment rendered, from which this appeal is taken.

The Issues Involved.

The allegations of the bill being admitted by defendant's motion to dismiss, the issues raised thereby are:

1. Whether the reinstatement of Rooney's entry canceled on relinquishment, made without fraud, is within the power of the Department.
2. Whether Boyle is not estopped by the record, as well as his concealment of the relinquishment and the will, in open and intended violation of the Statutes of Arizona, from obtaining any benefit thereunder as devisee.
3. Whether his action in attempting to make entry of the land in his own right, as an additional, rejected

because of Cohen's prior settlement, residence and application to enter, was not a waiver of any right he may have had under this will, concealed by him for seven years, during which time Cohen's rights attached?

4. Has the Department the power to require by regulation as an absolute condition, contestants to make and swear to requirements not made by the plain language of the statute, admittedly for the expressed purpose of defeating the operation of the statute?

As no opinion was rendered, we are without any light upon the views of that court upon any particular one of the reasons assigned by defendants in their motion to dismiss, and, therefore, it is incumbent upon us to argue all of them.

ARGUMENT.

Necessary Parties.

Judging from its former recent rulings, it would seem this Court is of the opinion that Boyle is a necessary party, although it is averred in the Bill that he is without the jurisdiction of the Court.

While a number of decisions might be cited to the effect that all persons who have interests which may be injuriously affected by the proceeding, are *generally* necessary parties, but, as so learnedly and elaborately pointed out by the United States Supreme Court, there are many exceptions to this rule. Does this case fall within any of them? Let us see.

First, under no possible consideration of the facts as set out in the Complaint, and not disputed, could Boyle have any legal right or interest in the land involved.

It is not contended that he could have obtained any right whatever under Rooney's will, which he fraudulently concealed, until the entry was canceled through relinquishment executed and delivered to Boyle, by him, and deliberately and purposely filed by him through his daughter, Helen, upon which the entry was canceled and application to make entry in her own name filed; could be reinstated and he file as devisee under the will. All this was attempted to be done, in the face of Cohen's settlement, residence and application, accepted when the land was open thereto.

It is insisted in behalf of the plaintiff, that if any power existed in the Department to reinstate it, *which is denied*, it could be done only in case of fraud, which is not claimed.

If the Department is without power, under any state of the case to reinstate Rooney's entry, canceled on relinquishment *through Boyle* to whom it was delivered, then it will be conceded the attempt is *ultra vires*, and all proceedings following it are absolutely void for lack of power. This being the case, how can it be said he is a "necessary" party? The statute requires the local officers to cancel an entry upon relinquishment and *eo instanti* it becomes public land. Neither the Commissioner nor the Secretary has anything whatever to do with it. The statute automatically, as it were, cancels it and restores it to the public domain. This is the purpose of the statute and we have no knowledge of any previous attempt having been made to ignore its plain provisions. Neither the President nor any of his secretaries, or any other official possesses any such power. Congress alone would have the power, and that body could do it only in the absence of any prior valid right.

In all the decisions the only suggested right was contained in a line reinstating it, that it was *filed* after the death of Rooney. This is not a valid objection under any circumstances, as it was equivalent to the conveyance of an interest; neither does the question of agency arise, as it was delivered to Boyle by Rooney in person during his lifetime. Moreover, Boyle could get no advantage of it, for he concealed the fact of the death of Rooney when the relinquishment was filed by his daughter to whom he had delivered it. If there is any fraud in the transaction he is the guilty party and should be the last person in the world to reap benefit from it, especially in the face of Cohen's valid settlement and residence and application on account of which Boyle's attempt to make entry in his own name, as an additional, was rejected and canceled. As said by Mr. Justice Hughes, speaking for the Supreme Court in the case of Philadelphia Co. vs. Stimson, Secretary of War (223 U. S. 605),

"The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but *challenges his authority* to do the thing of which complaint is made. The suit rests upon the charge of the abuse of powers, and its merits must be determined accordingly." (Italics ours.)

This is a proceeding in equity by the plaintiff against the defendants in their official capacity, to compel them to undo their unlawful acts to his irreparable injury, which acts redound incidentally to his, Boyle's, benefit, and to enjoin them in such capacity from further proceeding in any manner which would make this injury permanent. In behalf of this beneficiary of such unlawful acts, these officials voluntarily plead that he is an indispensable party and that the Court has no power to

grant relief against such unlawful acts, which perchance, might be to his injury, without bringing him into court, to assist them in defending such unlawful, official acts. To say the least, this plea for his help by these officials, to defend their acts to the injury of the plaintiff, is voluntary on their part, for, if he has any right, which he finds might be jeopardized, he could come to their defense and help them to defend *themselves* against *their* unlawful acts in the only possible method of his becoming a party, viz., by petition to intervene. If he is willing, as his acts conclusively prove he is, to let them defend their own wrongful acts without cost to him, and if they win, he becomes the beneficiary, he certainly has no ground of complaint.

As the late Chief Justice White, speaking for the court in the case of Daniels vs. Wagner, *supra*, said in that case, "the inherent vice" in holding plaintiff cannot proceed without bringing him into court at the behest of the defendants, lies in the fact that it prevents any proceeding of this kind, when, as in this case, the person is beyond the jurisdiction of the courts in this District. The result is that under our boasted judicial system, there may be "*a wrong without any remedy*," a thing abhorred by the English judicial system from a very early day, and vehemently denied as to our system.

In the early and oft-quoted case of Marbury vs. Madison (1 Cranch 137), the great Chief Justice Marshall quoted from Blackstone's Commentaries on this subject as follows:

"It is a settled and fundamental principle that every right, when withheld, must have a remedy, and every injury, its proper redress. There are some injuries which can only be redressed by writ of mandamus and others by a writ of prohibition.

There must, then, be a jurisdiction somewhere competent to issue that kind of process."

He also quotes as follows:

"Mandamus lies if there be a legal right and a remedy in equity." 3 Term Reports, 652.

As to our system the court, answering its own question, whether if a person has a right, and that right has been violated, the courts of his country afford him a remedy, said:

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.

"If this obloquy is to be cast on the jurisprudence of the country, it must arise from the peculiar character of the case."

After distinguishing between purely political cases in which the President alone acts, it is said:

"But when the legislature proceeds to impose on that office (The Secretary of State) other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot *at his discretion*

sport away the vested rights of others." (Italics ours.)

If Boyle, who is admittedly out of the jurisdiction of this court, and these officials can be sued in no other jurisdiction, which will be conceded, and he fails to come into court of his own accord, then the plaintiff is denied the remedy given by law, although in the language of Chief Justice Marshall, above quoted, these officials may "at their discretion sport away the vested rights of others," one of the "first duties of government" denied, and "this obloquy cast on the country." Against this contention we beg to cite the following decisions: Thirty years after this decision (viz., 1833), the same great Chief Justice in the case of *Vattier vs. Hinde* (7 Pet. 252) held:

"This certificate applies to the state of parties at the time of the decree, and affirms this principle. If the defendants have distinct interests, so that substantial justice can be done by decreeing for or against one or more of them, over whom the court has jurisdiction, without affecting the interest of the others, its jurisdiction may be exercised as to them. * * * It is the settled practice in the courts of the United States, if the case can be decided on its merits between those who are regularly before them, to decree as between them. Although other persons, not within their jurisdiction, may be collaterally or incidentally concerned, who must have been made parties had they been amenable to its process, this circumstance shall not expel other suitors who have a constitution and legal right to submit their case to a court of the United States, provided the decree may be made without affecting those interests." And decisions cited.

Adequate Remedy at Law after Patent.

In the case of *Lane vs. Hoglund* (244 U. S., 174), Mr. Justice Van Devanter, speaking for the court, quoted approvingly from the decision announced by Mr. Justice Peckham in the case of *Roberts vs. United States* (176 U. S., 221), as follows:

“Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. * * * If the law directs him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of a language by the officer. Unless this be so, the value of this writ is very greatly impaired. * * * Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, *no matter how plain its language nor how plainly they violated their duty* in refusing to perform the act required.” (Italics ours.)

In *U. S. vs. Black* (128 U. S., 40), the Court said:

“When they refuse to act in a given case at all, or when by special statute or otherwise, a mere ministerial duty is imposed upon them, that is, a service which they are bound to perform without

further question, then, if they refuse, a mandamus may be issued to compel them * * *.

"There is no room for the exercise of any discretion, official or otherwise; *all of that is shut out by the direct and positive command of the law*, and the act required to be done is, in every just sense, *a mere ministerial duty*." (Italics ours.)

As to this defense, High on Injunctions, a standard authority, 4th Ed., Vol. 1/47, states the rule as follows:

"To deprive a plaintiff of the aid of equity by injunction, it must also appear that the remedy at law is plain and adequate; in other words, that it is as *practical and efficient* to secure the ends of justice and its proper and *prompt administration* as the remedy in equity, and *unless this is shown* a court of equity may lend its extraordinary aid by injunction, notwithstanding the existence of a remedy at law. Citing Woodward vs. Woodward (148 Mo., 241-49 S. W., 1001), and Smyth vs. Arms, 169 U. S., 466, 76 Fed. 385; Watson vs. Sutherland, 5 Wall., 74; Walla Walla vs. Walla Walla Water Co., 172 U. S., 1, and a number of other cases. (Italics ours.)

Joyce on Injunctions states the rule in practically the same terms, and adds in Section 353, that—

"One with special injury may enjoin a public mission."

At Section 361, Vol. I, he states the rule settled by the Indiana Supreme Court to be,

“that a taxpayer may enjoin an unlawful tax if it increased his burdens of taxation. (Citing a long line of decisions), from doing an illegal act and transcending their lawful powers—Clay County Commissioners vs. Markle (46th Indiana, 96). It has been settled in the state that the remedy may be had by any taxpayer in his own name.”

Note 19—Also 32 Indiana, 244; English vs. Smack, 34 Ind., 115; Noble vs. Vincennes, 42 Ind., 125; Jager vs. Daugherty, 61 Ind., 528.

New York courts hold the same—See Kilbourne vs. St. John, 59 N. Y., 21, and the same vs. Allen. Such relief is also given by Statute of 1872, Ayers vs. Laverman, 59 N. Y., 192.

Can it be said the remedy at law is either “as plain and adequate,” or as “practical and efficient to secure the ends of justice,” or as “prompt in administration” as the remedy in equity. Unless this is “*shown*” a court of equity may lend its extraordinary aid by injunction notwithstanding the existence of a remedy at law. But unquestionably *there may be no remedy at law at all*; there certainly is none now open to plaintiff. If Boyle should relinquish, will counsel be kind enough to tell us what remedy he would have at law? The whole theory is based upon the presumption that he will obtain patent, which he may never do. As to promptness, it would take at least five years to reach a decision in the Supreme Court in an action to hold him as trustee, with many times the amount of cost. In this case we have the mere assertion that “plaintiff has the usual, complete and wholly adequate remedy of a suit against Boyle to charge said patent with a trust in his favor.” Is this sufficient?

The Relinquishment of Rooney.

What effect, if any, did the death of Rooney before his relinquishment was filed, have upon its legality as an abandonment to the Government of all his interest in the land and his entry? The Commissioner held his death before it was filed rendered it of no validity, and in the face of a valid pending application by Cohen, undertook to reinstate his entry. Is this the law? We insist it is not, whether it be considered from the standpoint of the creation of an agency, or not; for, if an agency, it was one coupled with an interest, and hence, enforceable after his death.

The correct doctrine is laid down by the Department in the case of *Wilson vs. Moore* (38 L. D., 475), wherein after stating that a right by entry or by mere possession of public lands is recognized by decisions of all state courts and by the Supreme Court in *Lamb vs. Davenport* (18 Wall., 307), and *Tarpey vs. Madsen* (178 U. S., 215), "subject to barter and sale," it is said:

"The relinquishment is merely *evidence of abandonment*, and that, with the other facts in this case, evidence actual abandonment, full and complete." * * *

"Where an entryman has before death actually abandoned and sold his improvements and right, the heir takes nothing by succession, though the sale and abandonment vested no legal right in the vendee and the relinquishment merely *restored* complete title to the United States. In this case, upon an actual, full and complete abandonment by Van Buren and relinquishment actually executed by him and given by him to another to be filed for his vendor, the entry was canceled. It is *not the ordinary case of agency* when one appoints another

to negotiate a transaction, but *one where the transaction* was concluded, the meeting of minds was complete and in consummation of it the relinquishment was handed to a third party to be delivered upon condition that the purchaser pay the agent consideration. Neither the vendor nor the heir can recall or disaffirm, except for fraud. The heir has no right or equity for reinstatement of the entry. It having been canceled according to the evident intent and desire of the entryman, who had completely abandoned, the heir took nothing, and cannot demand its reinstatement."

In that case, as in the one at bar, the relinquishment was executed when the entryman was at the point of death, and as in this case, not filed until after his death. The Secretary distinguishes it from the cases of *Orvis vs. Banks* (2 L. D., 138), *Confar vs. Confar* (15 L. D., 506), and *Robertson vs. Messent's Heirs* (18 L. D., 301), which cases held, as the Commissioner did in this case, that the party holding the relinquishment was *only agent* of the entryman; and *such agency was terminated* by Van Buren's death.

Bishop, in his excellent work on Contracts, enlarged Edition, Section 1054, states the correct doctrine briefly, as follows:

"If the agency is coupled with an interest, as already explained (Section 1051) the death cannot, on just principles, take from the agent his rights."

But, we are quite clear that under the statute as held by the Department in the case of *Moritz vs. Hintz* (On Review, 37 L. D., 383):

"The filing of an unconditional relinquishment operates *eo instanti* to terminate the entry, which is thereafter no obstacle to the making of a second entry by the entryman, notwithstanding it may remain uncanceled of record. Although his entry was not canceled of record until January 25, on a contest, he *in fact had no entry after filing relinquishment*, which then divested him of all claim."

In other words, the *entry immediately ceases to exist* when the relinquishment is filed. See also Cyc. Vol. 32 p. 1079, as to validity of such contract and consideration for notes given in payment.

It follows that in the absence of fraud the Secretary had no power whatever to reinstate an entry canceled by the local officers who are *alone charged* with this duty, and who accepted the application of Boyle's daughter, who filed the relinquishment, to enter the land in her own name. There is no possible power resting anywhere to reinstate this entry, except *through an act of Congress, and this could be done only in the absence of any prior right, such as that of Cohen, whose application to enter had been filed and accepted, entry directed and he was residing upon the land at the time of this pretended reinstatement*. It must be treated as absolutely void, and with this view and this holding whatever claim Boyle had must fall to the ground and the claim of Cohen be accepted and his rights protected.

The Department without Power to Deny Cohen's Application to Contest Boyle's Entry.

We have hereinbefore fully shown the limit of the power of the Secretary, and it is not necessary to further

enlarge upon this question as the Supreme Court has so fully settled it that there can be no mistake made as to the law.

But in this case we are told that Cohen is a stranger to the record because his contest affidavit was not corroborated in accordance with the latest requirements of the circular on the subject. Be this as it may, it will be admitted he tried hard enough to make himself a party to it. With his prior application to enter, his protest against the final proof, and his contest affidavit all pending, it would seem he would have a right to be heard.

The Act of May 14, 1880, provided for private contests at the expense of the contestant, who was given a prior right to enter when successful. The principle involved is the same as that given to informers of frauds, in the Treasury which is a moiety of the thing involved. For a long time it was held contests should be encouraged, as Congress evidently intended they should be, but the present circular which, it is claimed, was not complied with, would appear to have the opposite object in view as it requires not only that corroborating witnesses shall swear they have read the contest affidavit and know its contents to be true, but they are required in addition to swear that they have personal knowledge of the facts, and must "*set forth the facts in their affidavit.*" 44 L. D., 365; see Copp's L. D. 1890, pp. 89 and 140.

The circular of February 6, 1892, discarded all requirements except such as the statute made necessary. In the case of Johnson vs. Montgomery, 17 L. D., 396, the Department, referring to this subject, said:

"Attention is invited to the fact that the Act of May 14, 1880, authorizing relinquishments,

requires only that they shall be in writing, and the significant omission from general circular issued February 6, 1892, of any exactions beyond these prescribed in the act, indicates a closer purpose to abandon the rule laid down in the circular of May 25, 1880. The latest general circular simply follows the terms of the law, without enlargement, and your office is instructed to conform the practice to that view."

See also *Westenhaver vs. Dodds*, 20 L. D., 365, and cases cited.

It is conceded the Department has the power to make rules and regulations to carry into effect its provisions, but it is a very different thing to add *requirements not provided in the statute*, as a *condition to enjoying its benefits*, which not only tend to bar parties from enjoying the benefits of the statute, but barring them from being *heard* even, for the reason that they may have failed to have the language of their corroborating witness, or witnesses, couched in the *exact language* of this requirement, added to the plain provisions of the statute.

It is only necessary to refer to the recent case of *Daniels vs. Wagner* (237 U. S., 547) to sustain our position.

Cohen's contest against this reinstated entry was disallowed and dismissed, because not corroborated as provided by rule 3 of practice which requires "*these facts must be set forth in his affidavit*. App. Sept. 23/15."

It was for failure to comply with the last clause of this rule, which the Department in its final statement admitted was the cause of its denial and the rule defended, in letter to us dated March 12, 1921, stated:

“* * * The contest was dismissed for insufficient corroboration of the allegations made on information and belief in the contest affidavit. You especially complain of the provisions of Rule 3 of Practice which requires corroboration of contest affidavits, and also of the observation made by the Department in its decision of February 9, 1921, wherein it was said that the present case illustrates the wisdom of the rule requiring corroboration of contest affidavits.” * * *

The statute makes no such requirement. It is plain and unambiguous and has stood without change for more than 41 years. It is as follows:

“Sec. 2. In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead or timber culture entry, he shall be notified by the Register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands.” Copp 1890, Vol. 1, 338.

To which the Department has added in addition to rule 3, above, the following requirements also outside of and directly opposed to the policy of the law:

“(a) Name and residence of each party adversely interested, including the age of each heir of any deceased entryman.

(b) Description and character of the land involved.

(c) Reference, so far as known to the applicant, to any proceedings pending for the acquisition of title to or the use of such lands.

(d) Statement, in ordinary and concise language, of the facts constituting the grounds of contest.

(e) Statement of the law under which applicant intends to acquire title and facts showing that he is qualified to do so.

(f) That the proceeding is not collusive or speculative, but is instituted and will be diligently pursued in good faith.

(g) Application that affiant be allowed to prove said allegations and that the entry, filing, or other claim be cancelled.

(h) Address to which papers shall be sent for service on such application." 44 L. D., 395.

We are concerned here only with rule 3, which was amended September 23, 1913 (44 L. D., 365), requiring not only that at least one corroborating witness must state his personal knowledge of the facts, but must also set forth the facts in his affidavit. In the case of *Nemmich vs. Colyar* (47 L. D., 5), the Department attempts to justify this on the ground that

"it was adopted to prevent the allowance of unjustifiable attacks against entries, thus relieving the land department of the consideration of speculative and unwarranted contests and entrymen from the trouble and expense attendant on the defense thereof."

But, was the contest statute, which has been enforced unamended for forty-two years, designed by Congress, for any such purpose? On the contrary, was it not for the specific purpose of encouraging contests by offering a premium to anyone who would pay the land office fees and secure the cancellation of an entry, of a preference

right for thirty days after notice to enter? Does this regulation encourage proposed contests? It is frankly stated it does not, on the contrary, unless the contestant can find someone sufficiently familiar with the facts to swear to and *set them out in his affidavit* as of his personal knowledge, it will not be accepted and the entryman protected, even though not complying with the law.

“A regulation of a Department of the Government does not control the construction of an Act of Congress when its meaning is plain.” *Robertson vs. Downing* (127 U. S., 607), cited in 137 U. S., 552; 160 U. S., 141; 184 U. S., 307, and many federal decisions.

“Construction of Acts of Congress respecting public lands will be made by the Court without reference to the practice in the Land Department when that has not been uniform.” *U. S. vs. Haley*, 160 U. S., 136. Cited *Shane vs. U. S.*, 36 Ct. Claims, 468.

See also *Fairbanks vs. U. S.*, 181 U. S., 283; *Houghton vs. Payne*, 184 U. S., 66; *Fremont vs. U. S.*, 17 How., 557.

Here is a deliberate defense of the action of the Department, by rules and regulations not only to defeat the plain, unambiguous language of a peremptory statute but to openly criticize the *wisdom of the law*, and to *make one of its own*. This, too, in direct opposition to the *purpose* of the law. Can it be held, this is not “capricious or arbitrary?” See *Merritt vs. Welch*, 104 U. S., 702; *Soon Hing vs. Craily*, with *Tel. Co. vs. Esset*, 17 Wall., 432; *Hiatt vs. Shulz*, 180 U. S., 156; also *Hanar vs. Manchic*, 190 U. S., 247.

In *Frisbie vs. Whitney* (76 U. S., 9 Wall., 187), "Any regulation or practice" in fatal conflict (quoting *Rector vs. Ashley*, 6 Wall. 7, 33 U. S., 326, and other cases cited), with and not authorized by law is *without force and effect in law*, and no practice however long continued, can override a plain statutory right, unambiguous and not the subject of construction. *Wells vs. Fisher* (47 L. D., 288), citing *U. S. vs. Graham*, 110 U. S., 163; *U. S. vs. Alger*, 152 U. S., 384; *Webster vs. Luther*, 163 U. S., 131; and *Francis M. Bishop*, 5 L. D., 429.

In *Hoyt vs. Sullivan* (2 L. D., 283), Secretary Teller held:

"No rule promulgated for the administration of the law will be permitted in its operation to defeat a statutory right."

In *Ballinger vs. Frost*, (216 U. S., 240), it is said:

"However laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of Congressional legislation." Cases cited.

If the Department has the power and can shut off a hearing by adding requirements to the contest statute and thereby take the land from the settler and resident thereon, whose entry has been directed to be allowed in absence of adverse claims, and give it to a man whose course has been at least sinuous, from the start, and the courts decline to consider it, then in the language of Chief Justice Marshall, in *Marbury vs. Madison*, *supra*, "*sport away the vested rights of others.*"

See also *Williamson vs. U. S.* (207 U. S., 452), wherein it is held, on page 461:

"This power must, in the nature of things, be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute, and can not be held to have authorized him, by such an exercise of power, to virtually adopt rules and regulations *destructive* of rights which Congress had conferred." (Italics ours.)

In *Morrill vs. Jones*, 106 U. S., 160 Otto, 466, Chief Justice Wait held:

"The Secretary of the Treasury cannot, by his regulations, alter or amend a revenue law, nor put into the body of the statute a *limitation* which Congress did not think it necessary to prescribe."

The Department in its order attempting the reinstatement of Rooney's entry by making it subject to any *prior right*, admitted it could not be done with Cohen's settlement, residence and accepted application to enter, pending. But, notwithstanding this admission and order, Cohen's application which had been sustained by the local officers was canceled without any charge of any kind attacking its validity. Resort was had to calling upon this admittedly valid settler to *show cause* why his application should not be canceled. A valid claimant is required by one without right to assume the burden of a showing.

It will not do to say, as the Department seems to consider, that the action of the local officers in cancelling Rooney's entry without fraud was void, and that it remained in full force, and prevented the attachment of Cohen's claim; for, if absolutely void then, even if the power existed, no reinstatement could give it validity. The contrary view was recognized when such reinstatement

ment was directed "*in the absence of valid claims.*" The theory seems to have been that without making any charges, and without giving any reason therefor as a part of this illegal, invalid proceeding, his claim could be gotten out of the way, unless what? That he *give reasons* why it should not be rejected and canceled, although everything was of record and no reason shown why it should be done. And now it is said in a line, that he did not appeal from the reinstatement of Rooney's entry and, perforce, without law, rule regulation, "rhyme or reason" it must be canceled to make way for this unlawful proceeding.

1. The only legal action taken by the Department in all the ramifications of this case, was the acceptance of Cohen's homestead application during his settlement and residence on the land, and rejecting and cancelling Boyle's subsequent application, in his own name, for conflict with it.

2. The attempted reinstatement of Rooney's entry canceled on relinquishment delivered in his lifetime to Boyle, filed by his daughter to whom he delivered it, was so clearly beyond its power as to make it invalid for any purpose.

3. The cancellation of Cohen's application because of this attempted reinstatement in behalf of Boyle, as devisee under Rooney's will, was likewise absolutely void, and of no effect, and it must be reinstated.

4. The dismissal of Cohen's contest, although it was exactly in accord with statutory requirements, because not as required by Rule 3 of Practice, admittedly required as a *condition and limitation* for the purpose of *defeating the operation of the Statute*, was illegal, arbitrary and capricious.

5. That Boyle was estopped for admittedly fraudulently concealing Rooney's will for seven years and can get no advantage from it.

6. This was done deliberately and purposely in open violation of the law, according to his sworn answer, to prevent the courts and the lawyers from "eating it up." It is a case where he *knew the law* and defied it. He must not be permitted to profit by such unlawful action.

Two questions naturally arise:

First, Why should a relinquishment delivered during the lifetime of the entryman become void when the breath leaves his body? It is not the case in any other instrument representing value, and could in no manner be affected by him after its delivery in accordance with the intention of the parties. Such holding would render instruments for which large sums had been paid, wholly dependent for any value upon the life of the person executing it;

Second, It is true it is not a conveyance of property directly. Neither does it constitute the holder a mere agent, for he immediately becomes the owner with the right to file it and thus put an end to its existence simultaneously with its immediate cancellation and his own right to file for the land. *The entryman cannot take it back after its delivery. It at once becomes his valuable property*, subject to barter and sale. The fact that it is recognized as a thing of value and cannot be taken back after delivery, renders it impossible that its validity could be in any way affected by the death of the grantor. He could do nothing during his life to affect the property he has sold and transferred for a valuable consideration. If this be so, and it will be conceded, will it be contended his widow, heirs or devisees *could do what he could not have done while he lived?*

Conclusion.

1. Boyle admits and brazenly attempts to defend his intended violation of a statute designed to present to the courts of his State (Arizona), at the earliest practicable moment, last wills of the decedents of the State, upon the illogical and hence unbelievable ground of a fear the lawyers of his State were such "sharks" as to eat up small estates left by the wills of her old soldiers to their comrades in arms, unless he could *outwit them by defying the law*.

2. The highest officials of the Interior Department preventing a hearing upon the contest of Cohen, and (thereby keeping out of the record in the case the full facts) in accordance with their own fancy, as to what a law designed by Congress to require compliance with its acts by settlers under the homestead law, which had existed unamended for more than forty years, should have been; for the admittedly *expressed purpose* of defeating its wise provisions and protecting alleged violators of the law from proceedings authorized by Congress, as an aid to the Government, by relieving it of the expense of enforcing the law as designed by that body.

3. This law is doubly beneficial in that it brings to the bar of justice persons who fail to keep their contracts with the government to comply with the law, and rewards good citizens, who are willing to spend their own money in thus aiding the government, which seems to have been considered by Congress as a wise provision, but openly *repudiated* by the Interior Department and its enforcement *prevented* in this case to suit its own views and purposes, by a Department-made law.

4. The effect of such unwise, illegal action has been to reward Boyle, who, like the officials of the Depart-

ment, as to acts of Congress, not ignorantly, but advisedly, violated the laws of his State designed to protect the beneficiaries of the last will and testaments of its citizens.

5. And, finally, all considerations of the unauthorized and illegal reinstatement of Rooney's canceled entry, canceled by the local officers in strict and honest obedience to a peremptory provision of the law is cut off by the Department for the expressed reason that Cohen did not at the time appeal from this unauthorized act; and as to the failure to have the will probated and the concealment of its existence, by the suggestion that Cohen should have resisted the probate of this will which was concealed and if ever probated at all no proper proof of that fact could be obtained by the local officers in all their generous treatment of Boyle in disregarding Cohen's protest and giving him time after all these years of concealment to make probate and as late as the 23rd of December, 1919, months after his final proof was submitted, the Department directed them to have the proof "speedily filed"; instead of rejecting it upon Cohen's protest, as was the duty of the Department.

6. All through the record of this case there seems to be disclosed a deliberate purpose to defeat the operation of the law by keeping the real facts out of the record. Boyle admits it as to the concealment of Rooney's will and offers a very lame excuse, slandering the attorneys of Arizona in doing it. Again, if his course was straight, why take an official to Rooney's dying bed and under the claim of having paid his hospital expenses and furnished him a little money at times have the dying man execute these instruments not only making him his beneficiary in this land, but in all of his property, but no

statement any place as to any money loaned or paid for him.

7. The defiance of the homestead law in rejecting Cohen's application, based on his settlement and residence, we have already considered. The attempted reinstatement of Rooney's entry and the refusal to consider it because not appealed from, have been likewise considered and need not be further discussed, except, upon this latter point to refer to the decision of the Supreme Court in Knight vs. U. S. Land Assn. (142 U. S., 161), which held when a case was before the Department it was the duty of the Secretary to see the land did not go to persons not entitled to it, however it may have reached there. Will the courts sustain it?

Respectfully submitted,

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Washington, D. C., Sept. 11, 1922.

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**In the Court of Appeals of the District of
Columbia.**

OCTOBER TERM, 1922.

No. 3772.

MAX COHEN, APPELLANT,

v.

ALBERT B. FALL, SECRETARY OF THE INTERIOR, ET AL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT
OF COLUMBIA.

BRIEF FOR APPELLEES.

C. EDWARD WRIGHT,

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*APPEAL FROM THE SUPREME COURT OF THE DISTRICT
OF COLUMBIA.*

BRIEF OF APPELLEES.

The trial court sustained a motion to dismiss appellant's bill in equity wherein he asked for an injunction to restrain the Secretary of the Interior and the Commissioner of the General Land Office from patenting certain public land to one Boyle and to compel the allowance of Cohen's claim to said land. From a decree dismissing the bill the appeal is taken.

STATEMENT OF THE CASE.

For the purpose of this case, the facts must be taken from the bill of complaint, as the appellees did not file an answer but moved to dismiss. A full and more easily understood statement can not be made, as the averments in the bill are fragmentary.

Rooney entered the land under the homestead law in 1912. He established residence and made improvements thereon. He was entitled to a credit on the residence requirement for three years' service during the Civil War. About 11 months after his entry he died. Just prior to his death he executed a relinquishment of his entry and delivered it to Thomas Boyle.

Under the law (R. S. sec. 2291) a widow, or if there be none, the heirs or devisees, may make final proof. Rights vest in those nominated by the statute upon the death of the entryman. It is also the law that a written relinquishment becomes effective upon filing the same in the local land office. The execution of a relinquishment performs no office in itself.

After Rooney's death, Boyle's daughter, Helen, filed this relinquishment December 2, 1913, and applied to enter the land in her own right. Her application was rejected and the rejection was affirmed on appeal. Appellant only inferentially states the reason. He avers (R. p. 2) that "subsequently the suspension on account of which it was rejected having been revoked, by decision of August 5, 1918 (Note: The correct date is 1916), the Department remanded the case with directions to allow her application in the absence of any intervening claims."

Appellant applied to enter the land August 18, 1916 (R. p. 2), under the homestead law.

On August 31, 1916, Thomas Boyle filed application to enter the land as additional to his homestead entry. (This entry was made in 1890, not 1920 as averred; we go outside the record to correct this; else the averment would not be intelligible.)

Both applications were rejected (R. p. 3).

On March 11, 1918, the Commissioner of the General Land Office, on his own motion, reinstated Rooney's entry "for the benefit of his heirs and devisees, the relinquishment by him having been filed *after the entryman's death.*" (R. p. 3.)

In other words, a dead man can not relinquish rights which on his death vest by operation of the law in his heirs or devisees.

For Rooney left an heir. By will made by him on the day he died, he devised his property, including the homestead entry, to Thomas Boyle. The bill of complaint so shows. The existence of this will was not known at the time when the several adjudications above noted were made. Under section 2291 of the Revised Statutes, Boyle had a right to make final proof. This he did, June 26, 1919, (R. p. 3) upon the reinstatement of the Rooney entry under the Commissioner's order aforesaid, Cohen's application having been rejected as well as the application filed by Boyle in his own right.

We are not concerned with Boyle's compliance or noncompliance with the laws of Arizona about probating the will. That is a matter between him and the State, if he failed to offer the will for probate within the time required by the statute. It does

not invalidate the will and there is nothing in the record to show that anybody in Arizona has attacked it on that ground.

Final certificate has issued to Boyle (R. p. 3) and patent was ready to issue when this suit was brought to enjoin its issue to Boyle for the benefit of the devisees and heirs of Rooney (R. S. sec. 2448). (R. p. 6.)

Appellant's bill and brief make it a little difficult to understand just where he stands. He prays for the reinstatement of his entry and that the Secretary be not only enjoined from issuing patent to Boyle as aforesaid but also commanded to allow appellant's entry and in due course to issue a patent to him.

Yet in his bill, and brief also, his grievance seems to be that the Secretary "unlawfully, wrongfully, arbitrarily, and capriciously" rejected his application to contest Boyle's final entry as the devisee of Rooney (R. p. 4) and refused to accord appellant the preference right granted by the act of May 14, 1880 (21 Stat. 140).

The appellant, upon rejection of his homestead application, essayed another rôle: he appeared this time as protestant or contestant and filed protest against Boyle's final proof and an application to contest the entry.

This contest proceeding was dismissed because it did not comply with the requirements of the Rules of Practice. (R. p. 4.) The pleading is vague on the point. It is alleged that the application to contest was rejected because "it was not corroborated in

accordance with the current circular of instructions which contains requirements admittedly made for the purpose of hindering and preventing the due, regular, and lawful execution of the statute according to its specific terms and the evident purpose of Congress in its enactment"; meaning the act of May 14, 1880. On pages 16 and 18 of his brief, however, we are advised that it is Rule 3 of the Rules of Practice with the terms of which Cohen failed to comply; and it is appellant's contention that the rule is contrary to the statute. This rule (44 L. D. 365) is as follows:

The statements in the application must be corroborated by the affidavit of at least one witness having such personal knowledge of the facts in relation to the contested entry, as, if proven, would render it subject to cancellation, and these facts must be set forth in his affidavit.

Appellant's contest was dismissed because it did not comply with this rule.

The court will need only to read the bill to be advised that a somewhat mixed-up situation was presented to the Land Department for solution. The interested parties were before it and their rights were not determined until after they had been afforded opportunity to be heard.

One of the parties is dissatisfied with the results and, in this suit, seeks to have the court substitute itself for the Land Department and retry the case, with this difference: Whereas Boyle was before the

Land Department when the case was tried there, Mr. Cohen would be very glad to dispense with his presence when the case is tried here.

THE ISSUES.

The motion to dismiss presents three propositions:

(1) That the court is without jurisdiction to review the Land Department;

(2) That Boyle is an absent but indispensable party;

(3) And that appellant has the usual, complete, and wholly adequate remedy in a suit against Boyle after patent issues.

ARGUMENT.

These propositions have been so frequently and recently passed upon by this court that reargument is not only unnecessary but would be an imposition on the court. We, therefore, content ourselves with citing *Brady v. Fall* (280 Fed. 1017); *Foltz v. Payne* (50 App. D. C. 155); *Hall v. Lane* (48 App. D. C. 279).

There are a few matters with which appellant excites himself in his brief that invite comment.

The appellant treats the act of May 14, 1880, as the genesis of the right to contest an entry; its purpose being to encourage contests; while Rule 3 operates to curtail and to discourage contests.

The right to contest grew up long before the act of 1880. It had no statutory origin, and no statutory regulation. Entrymen attempted to secure title without compliance with the law and in fraud of the United States. Some citizen cognizant of the fraud

would bring it to the attention of the Land Department. He might be moved by patriotic impulse. He might be inspired by feelings of revenge. He might have a purely selfish purpose—might desire the land for himself and so inform the Land Department to the end that the outstanding entry might be canceled and the land thus be opened to another entry, his entry if he were quick enough. Whatever the motive, it was helpful in the administration of the public land law. But the informer, the contestant or the protestant, secured no benefit, sure benefit, from his activities. Others might, and did, reap where he had sown. An entry might be canceled wholly on grounds he had established; and yet some interloper might beat him to the local land office and enter the land. It was like the eagle and the osprey; the osprey catching the fish and the eagle eating it.

All that the act of 1880 accomplished or was designed to accomplish was to grant to a successful contestant, i.e., to a person who had contested and procured the cancellation of certain entries, the right to be notified of the cancellation and the further right, for 30 days from said notice, to enter the land. That is, it created a "preference right" in the contestant—a right to be preferred over all others for a period of 30 days. It did not create the right to contest. It did not regulate the contest itself. It simply provided a sure reward.

While the Land Department has been aided in administration by contestants, unhappily it has also been hindered, and entrymen have been annoyed,

by contests initiated in bad faith. It has been used to blackmail or to worry *bona-fide* entrymen, subjecting them to delay, embarrassment, and expense.

As the right to initiate a contest is not of legislative origin, but has merely grown up as a part of administrative practice, it should be difficult to convince any court that it is not subject to such a regulation as Rule 3 presents—the reason of the rule being stated in *Nemmich v. Colyar* (47 L. D. 5), a part of which is cited on page 18 of appellant's brief.

The appellant could not, at least did not, comply with this rule. The department had as much right to make this requirement as a court of equity possesses in making a rule that an answer to a bill must be verified in a certain manner.

The Land Department very properly dismissed Cohen's contest, and we submit that he should take nothing by his bill on that account.

The other point relates to Rooney's relinquishment. Appellant cites the Departmental decision in *Wilson v. Holmes* (38 L. D. 475).

An opinion or decision must be understood in relation to the facts in the particular case to which it relates. In *Wilson v. Holmes*, the contest was between a sister as heir at law of a deceased entryman (Van Buren) and a party, Holmes, who had paid for and purchased the improvements on the land. Van Buren also executed a relinquishment. A relinquishment confers no benefits upon a purchaser save as, upon filing, it frees the land of the entryman's

claim and permits the purchaser simultaneously and ahead of anyone else to make entry. Van Buren had actually abandoned the land, anyway, in his lifetime. He had sold what he actually owned thereon—his improvements. The question was whether, in this situation, the sister as a mere successor by operation of law, parting with nothing, with no more equity than a voluntary grantee subject to all equitable rights of others, could take to the exclusion of one who had bought and paid for the improvements, and in derogation of his equity. On these facts, the Department ruled against the heir, but without overruling the three former cases cited on page 13 of appellant's brief.

In this case, the Department ruled that "it is well settled that an entry should not be canceled upon relinquishment filed after the death of an entryman." That is the rule. That, too, undoubtedly is to be understood in the light of the facts in the case. Here it is not alleged that Rooney sold the improvements on his entry to anyone, received money therefor, and executed a relinquishment with that in view. What he did was to make Boyle his heir, his devisee, and the relinquishment had no real office to perform in that situation. It was clearly evident that he wanted Boyle to have everything he owned—and there was a very excellent reason for that desire. Boyle, the holder of the relinquishment, was Boyle the devisee. There was no conflict between the interests as there was in the *Wilson v. Holmes* case.

A relinquishment is a relinquishment to the United States, not to any person. Suppose the paper itself, after Rooney's death, was lost by Boyle and found by Cohen: Could Cohen file it and then, upon cancellation by the Department without the knowledge of the existence of the will, enter the land in derogation of Boyle's right as a devisee, owner of the improvements?

The *Wilson v. Holmes* decision was along lines recognizing equity where there was equity. What equity exists in Cohen, the interloper?

Appellant must show a better right to this land in himself—not that Boyle should not receive a patent. *Fisher v. Rule* (248 U. S. 314, 318). Should equity decree him a better right in view of the facts in this case?

If it should, it should be in a suit against Boyle where the latter can be heard.

We submit that the decree below should be affirmed.

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